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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

Z.B.,

Petitioner,

v.

THE SUPERIOR COURT OF SAN
DIEGO COUNTY,

Respondent;

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Real Party in Interest.

D062718

(San Diego County
Super. Ct. No. EJ3154E)

PROCEEDINGS for extraordinary relief after a referral to a Welfare and

Institutions Code section 366.26¹ hearing. Robert J. Trentacosta, Judge. Petition denied;
request for stay denied.

Z.B. challenges an order of the superior court making true findings on the section 300, subdivision (b) petition filed on behalf of her two-year-old daughter, Cassidy S., removing Cassidy from her custody, denying her reunification services and setting a section 366.26 hearing to consider a permanent placement for Cassidy. She contends that there was insufficient evidence to support the juvenile court's jurisdictional and dispositional findings and its denial of reunification services to her. We deny the petition.

FACTUAL AND PROCEDURAL BACKGROUND

Z.B. has a history of alcohol and drug abuse that started when she was 11 years old. In 1993, when she was 19, Z.B. pled guilty to driving under the influence and was ordered to participate in Alcoholics Anonymous (AA). In 2003, she was arrested for possession of a controlled substance and drug paraphernalia and ordered to participate in a drug treatment program.

As a result of Z.B.'s alcohol and substance abuse as an adult, she was often unable to care for her three oldest children (Savannah, Julia and Jack), who spent substantial time living with Z.B.'s relatives, including her sister and brother-in-law. (*In re Savannah D.* (Sept. 27, 2012, D061908) [nonpub. opn.] p. 2.)² In addition, numerous dependency referrals were made on their behalf between 2000 and February 2009; two of the referrals

² We take judicial notice of this unpublished opinion on Z.B.'s earlier appeal challenging the superior court's termination of her parental rights as to Savannah and Julia, as well as a prior petition for extraordinary relief filed by her relating to her third daughter, Jamie. (*Z.B. v. Superior Court* (Jan. 5, 2012, D060624).)

(one for general neglect in 2000 relating to Savannah and one in 2003 relating to Savannah and Julia) were substantiated.

In October 2009, the San Diego County Health and Human Services Agency (the Agency) received a report that Z.B. had repeatedly failed to pick up Jack from school, that Savannah, Julia and Jack were often hungry and unkempt when they came to school, that Savannah was often left in charge of her siblings' care and that their home was filthy and had no electricity or running water. The following day, Z.B. was arrested after she arrived in an intoxicated state to pick up Jack from school. The Agency filed a section 300 petition on behalf of Savannah, Julia and Jack and their eight-month-old sister, Jamie, and the court removed the four children from Z.B.'s custody and placed them with their maternal aunt.

Z.B. initially had difficulty abstaining from drinking but, in February 2010, she began to participate in a residential treatment program. After giving birth to Cassidy in July 2010, Z.B. experienced certain additional setbacks (including a substantiated referral for general neglect relating to Cassidy in November 2010), but made progress with her case plan. In March 2012, Z.B. successfully reunified with Jack and Jamie and the dependency proceedings were dismissed as to them. (All further relevant dates are in 2012 except as otherwise noted.) By that time, however, Z.B. had reduced her AA meeting attendance to once a week and, after the dismissal of the dependency proceedings over Jack and Jamie, the Agency began getting reports that they were again coming to school in a dirty and unkempt state and that Jack had stopped turning in his homework or making academic progress. In April, the juvenile court terminated Z.B.'s

parental rights to Savannah and Julia based on the failure of reunification efforts and placed them for adoption.

Less than a month later, Z.B. passed out in her car (in which Jamie and Cassidy were passengers) while waiting to pick Jack up from school; school staff had a difficult time waking Z.B. and reported that she smelled of alcohol. In an interview with social workers the next day, Z.B. initially denied that she had had anything to drink in the preceding two and one-half years and said that her blood pressure medication had caused her to become drowsy. When confronted with reports from school staff that she had smelled of alcohol, Z.B. claimed that she had one drink (a "beer with tomato juice") in the morning, but then worked in her backyard all day before going to the school. When asked how she would fare if tested for alcohol or drugs right then, Z.B. admitted that she might test positive for alcohol.

Based on this occurrence and a report that Z.B. had been under the influence when she drove Jack, Jamie and Cassidy to a restaurant on a prior occasion, the Agency filed new section 300 petitions on behalf of those children, who the court ordered placed in foster care.³ Shortly after the children were detained, Z.B. enrolled in a Family Recovery Center outpatient program and began regular visitation with them.

As a result of Z.B.'s substance abuse history, the termination of her parental rights to Savannah and Julia and her demonstrated inability to remain clean and sober absent court and Agency supervision, the Agency recommended that the juvenile court deny her

³ Z.B.'s current petition does not seek any relief as to Jack and Jamie.

reunification services and set a permanency planning hearing with respect to Cassidy. Cassidy's counsel joined in the Agency's requests.

Z.B. opposed the recommendations, arguing that her prompt voluntary participation in services established the absence of a risk of harm, that Cassidy should be returned to her care and that the court should order reunification services for her. The social worker testified, however, that given Z.B.'s extensive alcohol and substance abuse history, her participation in an outpatient program was not sufficient to protect Cassidy. The court removed Cassidy from Z.B.'s care, denied reunification services and set a permanency planning hearing for Cassidy.

Z.B. petitioned for review of the court's orders. (§ 366.26, subd. (l); Cal. Rules of Court, rule 8.452.) This court issued an order to show cause, the Agency responded and the parties waived oral argument.

DISCUSSION

1. *Jurisdictional Findings*

Section 300, subdivision (b) provides a basis for juvenile court jurisdiction where a child has suffered, or where there is a substantial risk that the child will suffer, serious physical harm or illness as a result of the parent's substance abuse and the resulting inability to provide regular care for the child. In enacting section 300, the Legislature intended not only to protect children who are currently being abused or neglected, but also "to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm." (§ 300.2.) The Legislature has emphasized that a child's well-being depends on a "home environment free from the negative effects of substance

abuse" (*Ibid.*) In this regard, the court need not wait until a child is seriously abused or injured to assume jurisdiction and take the steps necessary to protect the child. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 194-196.)

In the juvenile court, the Agency bears the burden of establishing harm or a substantial risk of harm by a preponderance of the evidence. (§ 355, subd. (a); *In re Rocco M.* (1991) 1 Cal.App.4th 814, 820.) On appeal, we review a challenge to a juvenile court's exercise of jurisdiction over a child to determine whether its findings are supported by substantial evidence. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The parent has the burden to establish the lack of sufficient evidence. (*In re L.Y.L.* (2002) 101 Cal.App.4th 942, 947.) Z.B. has not met that burden here.

Historical events, including a parent's past conduct, are relevant to the determination of whether a child presently needs the juvenile court's protection. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1135, disapproved on another ground in *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6; *In re Petra B.* (1989) 216 Cal.App.3d 1163, 1169 [recognizing that a parent's past conduct is a good predictor of future behavior].) In this case, the evidence of Z.B.'s inability to maintain her sobriety without intervention by the Agency and the court is essentially uncontroverted. Further, the fact that she was found passed out in her car, with her youngest two children present, amply establishes a risk of harm and thus supports the juvenile court's jurisdictional findings.

2. *Removal of Custody*

The juvenile court may remove a child from her parent's physical custody if there is clear and convincing evidence of "a substantial danger to the [child's] physical health, safety, protection, or physical or emotional well-being" and there are no other reasonable means of protecting the child's physical health. (§ 361, subd. (c)(1); Cal. Rules of Court, rule 5.695(d)(1).) Existing actual harm is not required; rather, the focus of the removal statute "is on averting harm to the child." (*In re Diamond H.*, *supra*, 82 Cal.App.4th at p. 1136.)

In determining whether a substantial danger exists, the court may consider a parent's past conduct and current situation and must assess whether she has progressed sufficiently to eliminate the risk of harm. (*In re S.O.* (2002) 103 Cal.App.4th 453, 461; cf. *In re Jonathan R.* (1989) 211 Cal.App.3d 1214, 1221.) In the juvenile court, the Agency has the burden of showing, by clear and convincing evidence, that removal is necessary to protect the child; in proceedings in this court, the parent bears the burden of showing that there is no substantial evidence to support the juvenile court's removal order. (*In re Diamond H.*, *supra*, 82 Cal.App.4th at p. 1135; *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

Again, the evidence supports the juvenile court's findings that removal was necessary to protect Cassidy from substantial danger. Z.B.'s alcohol abuse adversely impacted her ability to properly care for her children and, despite having had several opportunities to benefit from treatment, she was unable to mitigate the risks to them from such abuse. (See § 300.2 [recognizing that a child's well-being depends on the existing of

a home environment that is "free from the negative effects of substance abuse"].) The fact that Z.B.'s history was not limited to merely being under the influence of alcohol, but also driving under the influence with her children in the car, permitted the court to conclude that Z.B. failed to appreciate the danger of her conduct, to the children and herself, and that she would continue to engage in similar behavior in the future. This evidence supported the findings underlying the court's order removing Cassidy from Z.B.'s custody.

3. *The Denial of Reunification Services*

Once a child is removed from parental custody, the juvenile court must, except as provided in section 361.5, subdivision (b), order the Agency to provide services to the parent to facilitate family reunification. (*In re Jesse W.* (2007) 157 Cal.App.4th 49, 59.) The statutory exceptions to the requirement of reunification services reflect a legislative acknowledgement that it may be "fruitless to provide reunification services under certain circumstances." (*In re Baby Boy H.* (1998) 63 Cal.App.4th 470, 478.)

As relevant here, section 361.5, subdivision (b), provides:

"Reunification services need not be provided to a parent or guardian described in this subdivision when the court finds, by clear and convincing evidence, any of the following: [¶] . . . [¶]

"(10) That the court ordered termination of reunification services for any siblings . . . of the child because the parent or guardian failed to reunify with the sibling . . . after . . . [removal] from that parent or guardian . . . and that, according to the findings of the court, this parent or guardian has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling

"(11) That the parental rights of a parent over any sibling . . . of the child had been permanently severed, . . . and that, according to the findings of the court, this

parent has not subsequently made a reasonable effort to treat the problems that led to removal of the sibling [¶] . . . [¶]

"(13) That [a] parent has a history of extensive, abusive, and chronic use of drugs or alcohol and has resisted prior court-ordered treatment for this problem during a three-year period immediately prior to the filing of the petition that brought that child to the court's attention"

Z.B. contends that there was insufficient evidence to support the juvenile court's denial of reunification services to her under section 361.5, subdivision (b)(10), (11) or (13). We disagree.

It is undisputed that the juvenile court terminated reunification services for Z.B. in the dependency proceedings relating to Cassidy's sisters, Savannah and Julia, and later terminated Z.B.'s parental rights to them. Further, as discussed above, Z.B. was unable to integrate the tools taught in her numerous treatment programs to get control of her alcohol abuse problem, including the programs in which she participated in 2010 and 2011. Based on this past lack of success, the juvenile court could have reasonably concluded that Z.B.'s enrollment in additional treatment programs did not constitute a reasonable effort to treat her alcohol abuse problems. (See *Randi R. v. Superior Court* (1998) 64 Cal.App.4th 67, 73 [recognizing that where a parent has had many opportunities to gain control of her alcohol abuse problem, but has been unable to do so, it is not appropriate to sacrifice her children's futures merely to give her another chance to try to get and stay sober].)

Termination of reunification services is equally proper under section 361.5, subdivision (b)(13) based on Z.B.'s continued abuse of alcohol after participating in treatment programs. (*Karen S. v. Superior Court* (1999) 69 Cal.App.4th 1006, 1010.)

Where a parent has demonstrated an inability to use skills and behaviors taught in treatment to maintain a sober life, the juvenile court may properly conclude that the provision of reunification services would be ineffective to protect her child. (*Ibid.*) Such is the case here.

Substantial evidence supports the denial of reunification services to Z.B. as to Cassidy.

DISPOSITION

The petition is denied. The request for stay is denied.

McCONNELL, P. J.

WE CONCUR:

McINTYRE, J.

IRION, J.